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Name: Kerry Kiernan

JUDICIAL SELECTION COMMISSION

Application for Judicial Vacancy created by Judge Wechsler at New Mexico Court of Appeals

APPLICATION

PERSONAL

1. Full Name	Kerry Christopher Kiernan			
2. County of Residence	Bernalillo County, New Mexico			
3. Birthplace	Bronx, New York			
4. If born outside the US, give the basis for your citizenship				
5. Birth Date	04/23/ [REDACTED]			
6. Marital Status	Married			
7. If married, list spouse's full name	Mary Clement Gutterson (M. Clea Gutterson)			
8. Spouse's occupation	Attorney			
9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.				
Answer 9: No, but I would recuse myself from all appellate cases that would involve my spouse or her firm.				
10. List all places of residence, city and state, and approximate dates for the last 10 years				
Date(s) of Residence	Street Address	City	State	Zip
August 1993 – Present	3208 Calle de Laura NW	Albuquerque	NM	87104

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work)	
High School(s)	Sandia High School, Albuquerque, New Mexico, 1969-1972 (High School Diploma 1972)
College(s)	University of New Mexico, Albuquerque, New Mexico, 1972-1977 (B.A. History 1977) (Phi Beta Kappa)
Law School(s)	University of New Mexico Law School, 1979-1982, (J.D. 1982) (Honors in Clinical Law)

12. Bar Admissions and Dates	New Mexico State Bar, 1982 U.S. District Court, District of New Mexico, 1982 10 th Circuit Court of Appeals, 1991 U.S. District Court, District of Arizona, 1995 9 th Circuit Court of Appeals, 1995
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EMPLOYMENT

13. List Your Present Employment

Date(s) of Employment	June 2015 – Present
Employer	Kerry Kiernan, P.C.
Mailing Address	3208 Calle de Laura NW, Albuquerque, New Mexico 87104
Business Phone	(505) 926-2148; kerrykiernanpc@gmail.com
Position	Solo Practitioner
Duties	Appellate Practice
Supervisor	Self

14. List Your Previous Employment (beginning with most recent)

Dates of Employment	August 2005 – June 2015
Employer	Sutin, Thayer & Browne, A Professional Corporation
Mailing Address	PO Box 1945, Albuquerque, New Mexico 87103
Business Phone	(505) 883-2500
Business FAX	(505) 888-6565
Employer's Email Address	jdr@sutinfirm.com
Position	Senior Litigation and Appeals Attorney; Shareholder and Board Member
Dates of Employment	March 2004 – August 2005
Employer	Eaves, Bardacke, Baugh, Kierst & Larson, P.A.
Mailing Address	PO Box 35670, Albuquerque, New Mexico 87176-5671
Business Phone	(505) 888-4300
Business FAX	(505) 883-4406
Employer's Email Address	kkiernan@eb-b.com
Position	Senior Litigation and Appeals Attorney
Dates of Employment	February 2003 – March 2004
Employer	The Blake Law Firm, P.C.
Mailing Address	105 14 th Street SW, Albuquerque, New Mexico 87102
Business Phone	(505) 842-1800
Business FAX	Unknown
Employer's Email Address	Unknown
Position	Senior Litigation and Appeals Attorney
Dates of Employment	September 1991 – February 2003
Employer	Eaves, Bardacke & Baugh, P.A. (later Eaves, Bardacke, Baugh, Kierst & Kiernan, P.A.)
Mailing Address	PO Box 35670, Albuquerque, New Mexico 87176-5671
Business Phone	(505) 883-4300

Business FAX	(505) 883-4406
Employer's Email Address	kkiernan@eb-b.com
Position	Senior Litigation and Appeals Attorney; Shareholder
Dates of Employment	December 1987 – September 1991
Employer	Bruce Pasternack, P.C.
Mailing Address	700 Lomas NW, Albuquerque, New Mexico 87102
Business Phone	(505) 842-1800
Business FAX	Unknown
Employer's Email Address	None
Position	Associate attorney in Litigation and Appeals
Dates of Employment	October 1987 – December 1987
Employer	New Mexico Attorney General's Office
Mailing Address	PO Box 1508, Santa Fe, New Mexico 87504-1508
Business Phone	(505) 827-5843
Business FAX	Unknown
Employer's Email Address	None
Position	Attorney in Civil Division Representing State Agencies
Dates of Employment	August 1986 – October 1987
Employer	New Mexico Public Defenders' Office, Appellate Division
Mailing Address	301 Guadalupe Street, Suite 001, Santa Fe, New Mexico 87501
Business Phone	(505) 827-3909
Business FAX	None
Employer's Email Address	None
Position	Appellate Attorney
Dates of Employment	July 1984 – August 1986
Employer	New Mexico Court of Appeals
Mailing Address	Supreme Court Building, PO Box 2008, Santa Fe, New Mexico 87501
Business Phone	(505) 827-4925
Business FAX	None
Employer's Email Address	None
Position	Law Clerk to the Honorable A. Joseph Alarid
Dates of Employment	September 1982 – March 1984
Employer	Keleher & McLeod, P.A.
Mailing Address	201 3 rd Street NW, Suite 1200, Albuquerque, New Mexico 87103
Business Phone	(505) 346-4646
Business FAX	None
Employer's Email Address	None
Position	Associate Attorney in Litigation and Appeals

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:

Answer 15:

Benjamin Allison
Timothy J. Adler
Andrew Baranowski
Paul Bardacke
James E. Bristol, III
Anne P. Browne
Suzanne Wood Bruckner
Rodina C. Cave
Susan G. Chappell
Maria Montoya Chavez
Katherine Downey
Eduardo Duffy
Monica C. Ewing
Michael J. Golden
David G. Gordon
Susan M. Hapka
Robert G. Heyman
Tracy L. Hoffman
Christopher A. Holland
Breanna Houghton
Gbenoba N. Idah
Henry A. Kelly
Peter S. Kierst
Rachel S. King
Twila B. Larkin
Derek V. Larson
Stevan Douglas Looney
Christina Looney
Venu M. Manne
Keith Mier
Jean C. Moore
Lynn E. Mostoller
Sarita Nair
Michelle K. Ostrye
Charles J. Piechota
Jay D. Rosenblum
Sandra E. Rotruck
Frank C. Salazar
Justin R. Sawyer
Ronald J. Segal
Ray Shollenbarger
Andrew J. Simons

Mariposa Padilla Savage
Jeanne Y. Sohn
Travis R. Steele
Norman S. Thayer
Benjamin E. Thomas
Hannah S. Turner
Christina West
Daniel Chet Alderete
C. Shannon Bacon
Kim Bannerman
Christy J. Carbon-Gaul
Mark E. Chaiken
Saul Cohen
J. Katherine Girard
Andrea R. Guendelman
Helen Hecht
Tammi M. Kipp
Andrew Knight
C. Joseph Lennihan
Victor Montoya
Ken Stalter
John G. Baugh
John M. Eaves
Karen S. Mendenhall
Michelle Lalley Blake
Neil Blake
Robert Cates
David A. Garcia
David Halliburton
Marianne Hill
Rebecca Houston
Susan Kery
Lisabeth Occhialino
Jennifer Pruett
David Streubel
Kurt Van Deren
Clark Varnell
Marianne Woodard
Bruce Pasternack
Sarah Alley
Carol Baca
Andrea Buzzard
Lyn Hebert
Alicia Mason
Terry Mast
Jeff McElroy

Frank Murray
Maine Shafer
Scott Spencer
Michael Vargon
Kathy Zinn
Bruce Rogoff
Lynn Fagan
Susan Gibbs
Sheila Lewis
Deborah Moll
Barbara Albin
Thomas C. Bird
Robert H. Clark
Richard B. Cole
Robert C. Conklin
Margaret E. Davidson
P. Scott Eaton
Thomas E. Griess
Randall L. Hamblin
Paula Z. Hansen
Evan S. Hobbs
Patrick W. Hurley
Peter H. Johnstone
Kim E. Kaufman
Michael L. Keleher
Thomas F. Keleher
William B. Keleher

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?

Answer 16:

My experience is extensive. I have represented plaintiffs and defendants in automobile accident cases. I have represented plaintiffs in slip-and-fall cases, psychological malpractice cases, sexual abuse cases and wrongful death cases. I have also represented the Archdiocese of Santa Fe in the clergy sex abuse cases dealing with insurance coverage issues.

17. How extensive is your experience in Commercial Law?

Answer 17:

My experience is very extensive. I have represented plaintiffs and defendants in breach of contract cases, tortious interference with contractual relations cases, antitrust litigation and employment litigation. I have represented defendants in the defense of public bond issues, shareholder derivative lawsuits and environmental law matters. I have also represented plaintiffs in class actions against insurance companies alleging Unfair Practices Act violations. Along with Paul Bardacke, I have represented the state governments for both New Mexico and Arizona on Indian gaming matters.

18. How extensive is your experience in Domestic Relations Law?

Answer 18:

I have handled nine (9) appeals of domestic relations cases. Since opening my own appellate practice, domestic relations lawyers also call me regularly about trial and appellate issues.

19. How extensive is your experience in Juvenile Law?

Answer 19:

While a clerk at the Court of Appeals, I analyzed and researched various juvenile law cases that were assigned to Judge Alarid.

20. How extensive is your experience in Criminal Law?

Answer 20:

My experience is very extensive. As my employment history indicates, I was an assistant appellate public defender from 1984 to 1986. I handled over thirty-five (35) appeals during that time and I learned a wide variety of criminal law principles and criminal law procedure.

Two challenging cases I defended were *State v. Zinn*, 1987-NMSC-115, 106 N.M. 544, and *Fuson v. State*, 1987-NMSC-034, 105 N.M. 632. *Zinn* involved the infamous Linda Lee Daniels kidnapping, rape and murder case. At the heart of that appeal was the issue of whether an immunity agreement with a cooperating witness impermissibly coerced that witness's testimony. This was an issue of first impression in New Mexico. In *Fuson*, the Supreme Court overruled its own precedent and held on constitutional grounds that prejudice is presumed when the right of the peremptory jury challenge is denied or impaired.

I have also handled appeals from the prosecution side in quasi-criminal matters. I represent the Office of the Superintendent of Insurance ("OSI") on two (2) appeals from license revocations. In those cases, the OSI administratively prosecuted certain bail bondsmen for misappropriation of client money. The OSI revoked those bail bond licenses after a full evidentiary hearing. The individuals appealed. These appeals have now been dismissed because of Appellants' failure to follow the rules governing those proceedings.

21. How extensive is your experience in Appellate Law?

Answer 21:

My experience is very extensive. I am a Certified Specialist in Appellate Practice and have been since 2007. Since I began practicing law in 1982, I have handled approximately one hundred and five (105) appeals.

In addition to my experience in criminal appeals, I have handled a broad range of civil appeals. I have done personal injury appeals, domestic relations appeals, commercial contract and business tort appeals, appeals regarding the constitutionality of bond issues, Indian gaming appeals, employment appeals, inverse condemnation appeals, insurance class action appeals, and various regulatory appeals. I have been involved with and drafted approximately ten (10) extraordinary writs to the New Mexico Supreme Court involving mandamus and superintending control.

I was honored to be named in Southwest Super Lawyers in Appellate Practice for the years 2009 through the present. I was listed in "Top 25 Lawyers in New Mexico" in Southwest Super Lawyers for 2010 and 2012. Additionally, I have been listed as a "Litigation Star" for appellate and commercial litigation in Benchmark Litigation, and have been recognized in Best Lawyers in America for appellate practice since 2009. In 2013, I was recognized by Best Lawyers in America as Albuquerque Appellate Practitioner of the Year.

Since I joined the Appellate Practice Section of the State Bar of New Mexico in 1997, I have participated in lecturing on topics in appellate advocacy. I was Chair of the Board of the Appellate Practice Section from 1999 to 2000, and in that capacity helped organize the CLE for the Appellate Practice Institute for that year. Additionally, since 1999, I have taught at the annual Appellate Practice Institute eight (8) times and have taught twice at CLE seminars put on by the National Business Institute. All of these lectures have been about one or more aspects of appellate practice, writing and oral argument.

I have also spent considerable time each year fielding calls from attorneys who have questions on appellate practice and procedure. Although these calls sometimes result in my formal appearance in these cases, many times they just result in information sharing with the attorneys.

Some challenging civil cases I have handled on appeal include: *Bolton v. Board*, 1994-NMCA-167, 199 N.M. 355 (dealing with challenge to bond issue on constitutional and statutory grounds); *Davis v. Board*, 1999-NMCA-110, 127 N.M. 785 (Court of Appeals held as matter of first impression that county owed duty not to make negligent misrepresentation to psychiatric hospital regarding former employee when county undertook to give employment reference); *Azar v. Prudential Ins. Co. of America*, 2003-NMCA-062, 133 N.M. 669 (dealing with insurance company's duties of disclosure as to premium structure under common and statutory law); *Berry v. Federal Kemper Life Assurance Co.*, 2004-NMCA-116, 136 N.M. 454 (first *national* class action certified in New Mexico involving insurance company's duty of disclosure); *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, 146 N.M. 1 (Supreme Court reversed Court of Appeals and held that lost profits were compensable in inverse condemnation action against municipality); *Waggoner v. Town of Mesilla*, 2011-NMCA-041, 149 N.M. 596 (representing petitioners who challenged annexation proceeding; annexation proceeding was invalidated on appeal); and *Harrison v. Lovelace Health Systems, Inc.*, 2013-NMCA-105, 311 P.3d 1236

(representing Regents of University of New Mexico on issue of first impression regarding limits of trial court's inherent power to sanction public entities).

In 2011, I was deemed qualified by the bi-partisan state-wide Judicial Nominating Commission to sit on the New Mexico Court of Appeals, and my name was forwarded to Governor Martinez. I did not receive the appointment.

I was also found qualified in December of 2016 and January of 2017 by the Judicial Nominating Commission for the vacancies created by the retirements of Judge Bustamante and Judge Kennedy. My name was forwarded to the Governor, but I was not chosen for those two positions.

22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.

Answer 22:

I have tried three (3) cases to a jury. One was a criminal misdemeanor case in the Bernalillo County Metropolitan Court. The other two were civil cases in Federal Court for the District of New Mexico: one was the defense of a wrongful death case, and the other was a breach of contract dispute involving a race horse. None of these occurred within the last two (2) years. The last one, involving the race horse, occurred in 2012.

23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.

Answer 23:

I have tried one (1) case without a jury. This was a civil trial for assault and battery before the Metropolitan Court. This case did not occur within the last two (2) years. I also represented a plaintiff class of insurance policy holders in an evidentiary class certification hearing in State District Court in 2003.

24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.

Answer 24:

Approximately one hundred and five (105) appeals. I have handled thirteen (13) appeals in the last two years. (Most of my criminal appeals were decided by memorandum decisions that were not published in the 1980s and so will not appear in any database. There are also a number of civil appeals that settled either before or after briefing and after lengthy negotiations, and so the appellate court did not render a formal decision in those cases).

PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS**25. Public Offices Held and Dates**

Public Office	Dates
Not Applicable	

26. Activities in professional organizations, including offices, held, for last 10 years

Professional Organization	Position Held	Dates
New Mexico Disciplinary Board	Hearing Committee Member	Current
State Bar of New Mexico, Appellate Practice Section	Chair, Past Board Member, and Current Member	1997 - Present
State Bar of New Mexico	Member	1982 - Present
State Bar of New Mexico Bridge the Gap Mentor Program	Member	2011
H. Verle Payne Inns of Court	Member	2005-2006
Supreme Court, Appellate Rules Committee	Member	1998-2003
American Bar Association	Member	1982-1984; 2005-2006

27. Activities in civic organizations, including offices, held, for last 10 years

Civic Organization	Position Held	Dates
University of New Mexico Law School Alumni Association	Board Member	2010-2013

28. Vocational interests and hobbies

Answer 28: Reading, Softball and Gardening

29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.

Answer 29: [REDACTED]

30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify

Answer 30: [REDACTED]

31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.

Answer 31: [REDACTED]

32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?

Answer 32: [REDACTED]

33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?

Answer 33: [REDACTED]

34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).

Answer 34: No.

35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?

Answer 35: No.

36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?

Answer 36: Not Applicable.

37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?

Answer 37: Not Applicable.

38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.

Answer 38: Yes.

39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.

Answer 39: No.

40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:

Answer 40: Kerry Kiernan, P.C. (President)

41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.

Answer 41: No.

42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.

Answer 42:

Under Art. VI, Sections 8 and 28 of the New Mexico Constitution, a judge of the Court of Appeals must be at least thirty-five years old, have practiced law for at least ten years preceding the assumption of office, and have resided in the state for at least three years immediately preceding the assumption of office. I am sixty-two (62) years old, I have been in the actual practice of law for thirty-four (34) years, and I have resided in New Mexico continuously since 1968.

43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.

Answer 43:

I have handled approximately one hundred and five (105) appeals in various subject areas over the course of my career. I am also a Certified Specialist in appellate practice. All of this has prepared me for the position of appellate judge. I have had an interest in that position since I began practicing law in 1982.

I became attracted to legal reasoning, writing and argument when I clerked for Judge Alarid at the Court of Appeals from 1984 through 1986. These legal tasks suited my personality and the skills that I was pursuing. Additionally, from my observations, the judges enjoyed their jobs and were productive at them. I wanted that same sense of enjoyment and productivity. But I realized the job presented formidable challenges. Appellate judges not only have to master the law; they also have to be keen students of social policy and of the collaborative process, shepherding opinions from early drafts to published dispositions.

I have been fortunate to have been exposed to a wide variety of litigation matters, and a wide variety

of appeals, both criminal and civil. I have also benefited from the opportunity to discuss and lecture on appellate practice and procedure in various seminars over the last seventeen (17) years. That exposure has reaffirmed my recognition of the challenges that appellate judges face and the contributions they make. That exposure has also reaffirmed my interest in being considered for the position of appellate judge.

After not being appointed in 2011 to the Court of Appeals, I decided to run for the position. I worked throughout 2013 and 2014 to achieve this goal. I was the Democratic Party nominee for the Court of Appeals in 2014. I ran a very time consuming and challenging state-wide campaign for the office. I lost the general election to the incumbent, Judge Hanisee, in 2014. That experience has not diminished my interest in that vital position.

My recent appointment as a Hearing Committee Member for the New Mexico Disciplinary Board, where I will preside with others in a 2-day hearing at the end of August 2017, has reaffirmed my interest in serving as a judge rather than as an advocate.

44. Does submission of this application express your willingness to accept judicial appointment to the New Mexico Court of Appeals if your name is chosen by the Governor?

Answer 44: Yes.

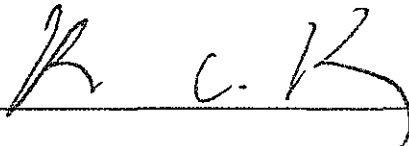
Items to be Submitted in Separate Document(s)

1. Please have **at least two, but not more than five**, letters of recommendation submitted directly to The Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, **the original letters must be mailed directly from the source to the Judicial Selection Office.**
2. Please attach a list of no more than eight (8) references.
3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.
4. You may also attach a copy of **one** other publication you have written which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.
5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s/:  Date: 8-11-17

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

TRACI and KENNETH HARRISON,
Individually and as Parents and Next
Friends of BRILEY HARRISON,

Plaintiffs-Appellees,

Respondent

v.

Sup. Ct. No.

Ct. App. No.

13 / 34349

32,215

CV-09-9855

LOVELACE HEALTH SYSTEM, INC.,
a New Mexico corporation, BOARD
OF REGENTS OF THE UNIVERSITY
OF NEW MEXICO, and ABQ
HEALTH PARTNERS, LLC,

SUPREME COURT OF NEW MEXICO

OCT - 4 2013

CPH

Defendants-Appellant-

Petitioner

DEFENDANT-APPELLANT BOARD OF REGENTS
OF THE UNIVERSITY OF NEW MEXICO'S PETITION
FOR WRIT OF CERTIORARI

Kerry Kiernan
Timothy J. Adler
Sutin, Thayer & Browne
A Professional Corporation
P.O. Box 1945
Albuquerque, New Mexico 87103
Telephone: 505-883-2500
Facsimile: 505-888-6565

*Appellate Counsel for Defendant-
Appellant Board of Regents of the
University of New Mexico*

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*In-House Counsel for Defendant-
Appellant Board of Regents of the
University of New Mexico*

I. INTRODUCTION

A divided Court of Appeals has abandoned the principle this Court established in *State ex rel. New Mexico State Highway and Transp. Dep't v. Baca*, 1995-NMSC-033, 120 N.M. 1: that there are, and must be, limits to a court's power to sanction a public entity. The limits are exceeded when, as here, a district court imposes a purely punitive, monetary sanction against a public entity that innocent taxpayers must bear.

Based on conduct that it considered sanctionable in a medical malpractice case, the district court imposed a punitive, monetary sanction against Defendant-Appellant Board of Regents ("Regents") of the University of New Mexico ("University"). It ordered them to pay \$100,000 to four local charities that were not parties to or otherwise connected with the case. While the law permits sanctions against a public entity that have a compensatory effect on those injured by the conduct, the law does not permit a purely punitive sanction. To permit such a sanction unjustifiably injures taxpayers who have committed no wrong.

A majority opinion of the Court of Appeals has now affirmed the district court's imposition of this punitive sanction. *Harrison v. Lovelace Health Systems, Inc*, 2013-NMCA-____ (No. 32,215 Sept. 5, 2013), attached as Exhibit A. It holds that the inherent power of a court is above all other

considerations. However, Judge Garcia's dissenting opinion recognizes that a punitive sanction that is "simply borne by innocent taxpayers" violates the teachings of *Baca. Harrison*, 2013-NMCA-____, ¶35 (Garcia, J., dissenting).

The practical effect of the purely punitive sanction is to negatively impact the educational, research and healthcare mission that the University has been assigned by the public. This unchecked purely punitive award ultimately injures innocent taxpayers who pay for that mission. Under these circumstances, certiorari should be granted, and the Court of Appeals should be reversed. Rule 12-502(C)(2)(d), NMRA.

II. DATE OF ENTRY OF THE DECISION

The Court of Appeals' Decision was filed on September 5, 2013.

III. THE QUESTION PRESENTED FOR REVIEW

Whether the district court's imposition of a purely punitive monetary sanction against a public university which will be borne by innocent taxpayers violates the principle established by this Court in *Baca*?

IV. FACTS MATERIAL TO THE QUESTIONS PRESENTED

Although the issue in this case is a legal one, the following facts are necessary to put the issue into perspective.

The sanctions grow out of an underlying medical malpractice case in which Regents were one of multiple defendants. [RP 1-8] Plaintiffs had retained an expert witness who was employed by the University. [RP 932] Regents' attorney, Scot Sauder ("Counsel"), determined under various University policies and procedures that the witness's engagement would result in an irreconcilable conflict with the University. [RP 533-539] While there is a dispute as to how it was communicated to the witness, the witness ultimately withdrew from the case. [RP 933]

Immediately after learning of the withdrawal, Plaintiffs filed a motion for sanctions against Regents. They argued that Regents and Counsel acted improperly by forcing the withdrawal of the witness and undermining the litigation process. [RP 300-309; RP 450-460] Regents and Counsel argued in response that it was a violation of University policies for the witness to engage in a conflict of interest with the University; that his testimony would create a conflict of interest; and that it was Counsel's job to evaluate whether a conflict of interest existed and to advise Regents if it did. [RP 536-43]

The district court ruled in Plaintiffs' favor. It concluded that the testimony of the witness would not constitute a clear violation of any UNM policy. [RP 935] Moreover, the court found fault with Regents and Counsel

because they did not file a motion in open court seeking to prevent the witness from testifying. [RP 938-939]

Although the court found no evidence that Counsel acted with malice, it concluded that his actions were inappropriate and had an adverse effect on the conduct of the litigation. [RP 939] The court also concluded that Regents' denial that anything improper occurred "also provides a basis for sanctions within those inherent powers of the Court in order to deter such conduct in the future from both Regents and those similarly situated." [*Id.*]

The court issued a series of monetary sanctions. It concluded they were appropriate because the underlying dispute between Plaintiffs and Regents had ultimately settled, rendering the sanction of default judgment originally requested by Plaintiffs impossible. [RP 939] First, the court ordered Counsel to pay \$1,500 to the Roadrunner Food Bank with his personal funds. [RP 940] Second, the court ordered Regents to pay Plaintiffs their reasonable costs of \$12,000 incurred in hiring the expert and then finding a new one. Third, the court ordered Regents to pay Plaintiffs their attorneys' fees related to the motion for sanctions amounting to \$20,000. [*Id.*] Fourth, the court ordered Regents to be punished and sanctioned in the sum of \$100,000. The \$100,000 was to be divided amongst four local New Mexico charities and paid to them. None of the

charities were parties to the case, had any direct or remote interest in it, nor had any other conceivable connection with it. [i/d.] It is this punitive sanction of \$100,000 which is at issue. Regents unsuccessfully asked the court to reconsider it. Regents then appealed, and the Court of Appeals has now affirmed. These circumstances necessitate review in this Court.¹

V. THE BASIS FOR GRANTING THE WRIT

The majority decision of the Court of Appeals conflicts with decisions of the Supreme Court, another decision of the Court of Appeals, and also raises an issue of substantial public interest that should be determined by the Supreme Court. Rule 12-502 (C)(2)(d).

The Court of Appeals' majority decision concluded that "[o]ur Supreme Court did not hold, much less convey a view, in *Baca* that sanctions without a compensatory aspect are the equivalent of a punitive damages award." *Harrison*, 2013-NMCA-___, ¶ 21. This statement conflicts with the Supreme Court's reasoning in *Baca* that monetary awards that are only imposed for the purposes of punishment and deterrence, like the \$100,000, are punitive and impermissible. *Baca*, 1995-NMSC-033, ¶ 22.

¹ Counsel paid the individual sanction against him with his personal funds as ordered by the court. [RP 964] Regents have paid costs and attorneys' fees to Plaintiffs as required by the court. [RP 945] Payment of the \$100,000 has been automatically stayed pending the outcome of the appeal. NMSA 1978, § 39-3-23 (1966).

"[P]unitive damages, when assessed against the State, punish taxpayers rather than wrongdoers." *Id.* While *Baca* permitted an attorney's fee sanction against a public entity, it did so only because the sanction "has both punitive and compensatory elements." *Id.* ¶ 23.

In his dissenting opinion, Judge Garcia recognized that a purely punitive sanction that is "simply borne by innocent taxpayers" is not permitted under *Baca*, and that the "Supreme Court's analysis in *Baca* directs otherwise." *Harrison*, 2013-NMCA-____, ¶¶ 35, 37.

Additionally, the majority opinion conflicts with an earlier decision of a different panel of the Court of Appeals. *Estate of Lajeunesse v. Board of Regents*, 2013-NMCA-004, ¶¶ 29-30, *cert. quashed*, 2013-NMCERT-____ (No. 33,878, Jan. 28, 2013). The Court of Appeals in *Lajeunesse* followed *Baca* and reaffirmed that punitive awards are not available against the state. In holding that a district court can impose double costs against a public entity under the provisions of Rule 1-068 NMRA, the Court utilized *Baca* as a guide. It concluded that the costs were permissible precisely because they were "not punitive damages" and that they had the primary purpose of acting "as an incentive to settlement." *Lajeunesse*, 2013-NMCA-004, ¶¶ 29, 31. Unlike the majority opinion in this case, the Court of Appeals in *Lajeunesse* reaffirmed *Baca*.

The interests of the public are clearly at stake. The Court of Appeals has affirmed the district court decision that forces the Regents of the state's largest public university to pay a purely punitive \$100,000 sanction to four charities who have no connection with the underlying case. By the district court's own admission, the sanction was a punitive sanction because it was imposed "to deter such conduct in the future." [RP 939] The district court also warned that to be a meaningful punitive sanction, it "must be sufficiently significant in light of the misconduct at issue and the relative size and resources of the wrongdoers." [*Id.*] Unfortunately, the district court and the Court of Appeals overlook that innocent taxpayers constitute the "resource" from which payment is sought. This Court should issue a writ to review and reverse the Court of Appeals.

VI. REASONS FOR THE WRIT

This Court in *Baca* was confronted with two questions. The first was whether its holding in *Torrance County Mental Health Program, Inc. v. New Mexico Health and Environment Dep't.*, 1992-NMSC-026, 113 N.M. 593, was still the law. This Court in *Torrance County* concluded that "the depletion of public revenues and the punishment of innocent taxpayers are important policy concerns that disfavor government liability for punitive damages." *Baca*, 1995-NMSC-033, ¶ 25. The second question was

whether, in light of *Torrance County*, a district court could award attorney's fees against the State for sanctionable conduct. The *Baca* Court settled upon a rational compromise. It reaffirmed its holding in *Torrance County*, but it also upheld the inherent power of a court to control the parties before it. *Baca*, 1995-NMSC-033, ¶ 25. The *Baca* Court held that a court has the inherent power to impose a sanction of attorney's fees against a public entity because attorney's fees are not purely punitive in nature. *Id.* ¶¶ 20-24. In a lengthy discussion, this Court took pains to distinguish attorney's fee awards from purely punitive awards. This Court noted that there are checks upon attorney's fees "that are absent from a punitive damages award." *Id.* ¶ 21. Attorney's fees must rest upon a finding that "the actions for which fees are sought reasonably were necessary to defend [or prosecute the] claim." *Id.* (citation omitted). This requirement "will serve as a general restraint on attorney's fee awards that are absent from purely punitive awards." *Id.* The Court concluded that there is "a compensatory aspect to attorney's fee awards that distinguishes them from awards for punitive damages." *Id.* ¶ 22. The fundamental purpose underlying punitive damages are "punishment and deterrence." *Id.* "While it is certainly true that attorney's fee awards are a punitive sanction, they also have a compensatory aspect, and whereas the punitive effect might be lost when

an award is made against the State, the compensatory effect will not." *Id.* In sum, attorney's fee awards have a punitive feature, but are permissible because they also are compensatory. However, additional sums that are solely punitive are impermissible because they put an unfair burden on innocent taxpayers.

If *Baca* permitted purely punitive sanctions, then this Court would not have focused upon the critical distinction between purely punitive awards and attorney's fees. If *Baca* means what the Court of Appeals says it means, then this Court would not have unequivocally reaffirmed *Torrance County*. No one can doubt that the \$100,000 directed to four non-party charities is purely punitive. The district court made this clear. The award does nothing to compensate Plaintiffs, their counsel, or any other party. It was imposed to punish and deter. Innocent taxpayers must bear that price. New Mexico public policy prohibits this outcome. See BIC 8-17; RB 2-6.

VII. PRAYER FOR RELIEF

Regents respectfully request that this Court grant this Petition and reverse the majority decision of the Court of Appeals and the district court.

Respectfully submitted,

SUTIN, THAYER & BROWNE
A Professional Corporation

By


Kerry Kiernan
Timothy J. Adler

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*Appellate Counsel for Defendant-
Appellant Board of Regents of the
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and

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*In-House Counsel for Defendant-
Appellant Board of Regents of the
University of New Mexico*

ATTACHMENTS

1. Five (5) Letters of Recommendation are being mailed directly from the authors:
 - The Honorable A. Joseph Alarid;
 - Paul Bardacke;
 - Thomas Bird;
 - Charles Peifer; and
 - Edward Ricco

2. References:

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 Paul Bardacke	 (505) 995-8000
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Santa Fe, New Mexico 87501-3001	
 Thomas Bird	 (505) 346-4646
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 The Honorable Cynthia Fry	 (505) 897-1295
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Corrales, New Mexico 87048-9403	
 Steven Looney	 (505) 883-2500
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 Charles Peifer	 (505) 247-4800
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 Edward Ricco	 (505) 768-7314
201 Third Street NW, #2200	
Albuquerque, New Mexico 87102-3380	
 Jay Rosenblum	 (505) 883-3428
6565 Americas Parkway NE, #1000	
Albuquerque, New Mexico 87110-8181	

3. Writing Sample:

Enclosed is a Petition for Certiorari filed in the New Mexico Supreme Court (and later granted). Although other names appear on the Petition, I wrote the Petition in its entirety.

PEIFER, HANSON & MULLINS, P.A.

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CHARLES R. PEIFER
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MATTHEW R. HOYT
LAUREN KEEFFE
MARK T. BAKER
ELIZABETH K. RADOSEVICH
MATTHEW E. JACKSON
CARTER B. HARRISON IV

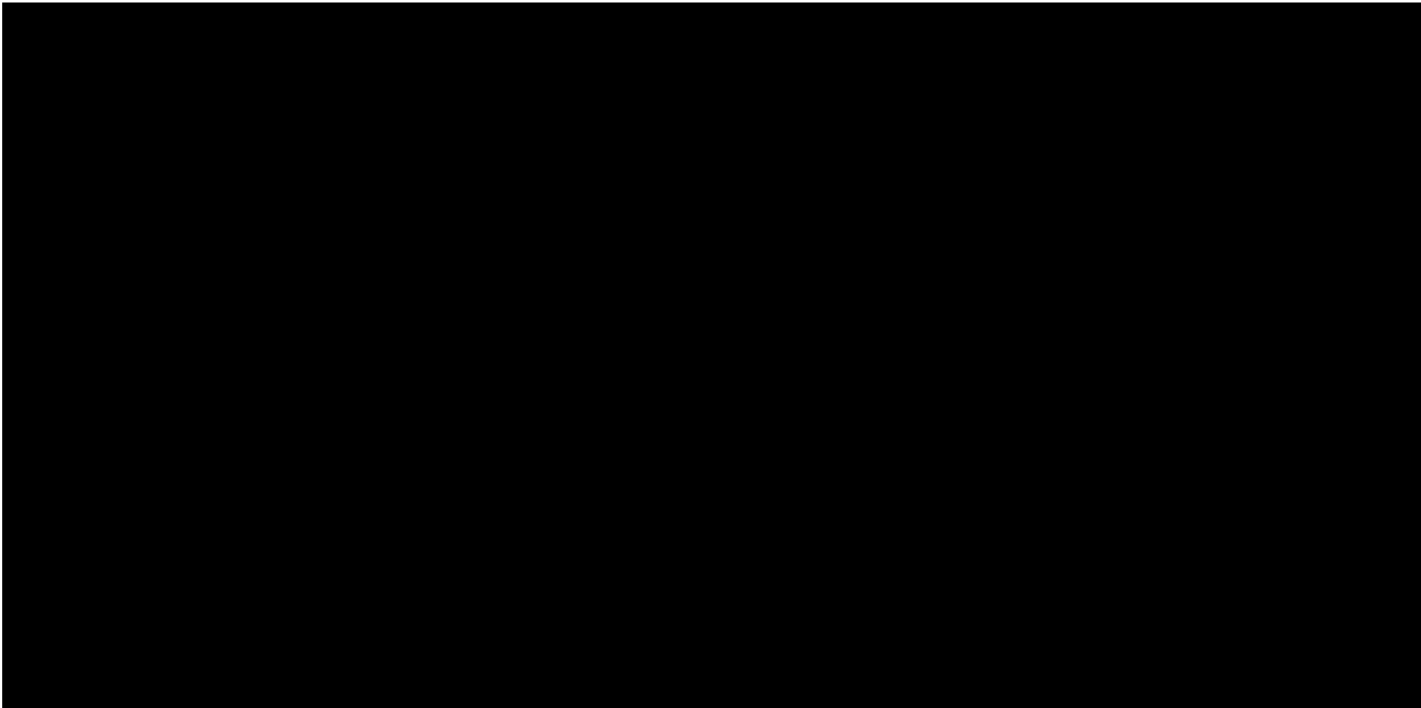
CERIANNE L. MULLINS
GREGORY P. WILLIAMS
OF COUNSEL

August 11, 2017

Chair, Judicial Selection Commission
UNM School of Law
MSC11 6070
1 University of New Mexico
Albuquerque, NM 87131-0001

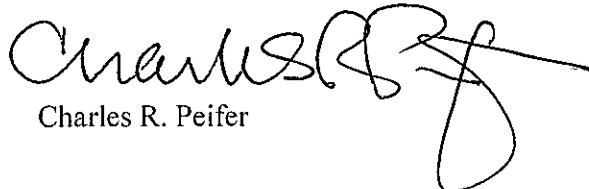
Re: Kerry Kiernan; Vacancy created by Judge Wechsler's retirement

Dear Commission:



Very truly yours,

PEIFER, HANSON & MULLINS, P.A.


Charles R. Peifer

CRP/ncd

KELEHER & McLEOD, P.A.

ATTORNEYS AND COUNSELORS AT LAW

101 YEARS



Running Horses © Gray Mercer 1989

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August 8, 2017

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THOMAS F. KELEHER
CLYDE F. WORTHEN
W. SPENCER REID
THOMAS C. BIRD
KURT WIHL
S. CHARLES ARCHULETA
DAVID W. PETERSON
SEAN OLIVAS
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TINA MUSCARELLA GOOCH
CHAD F. WORTHEN

NATHAN S. STIMSON
ANDREW ANDERS
ZACHARY R. CORMIER
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CHRIS R. MARQUEZ

Of Counsel:
RICHARD B. COLE
ROBERT J. PEROVICH
RICHARD K. BARLOW
BRIAN J. O'ROURKE

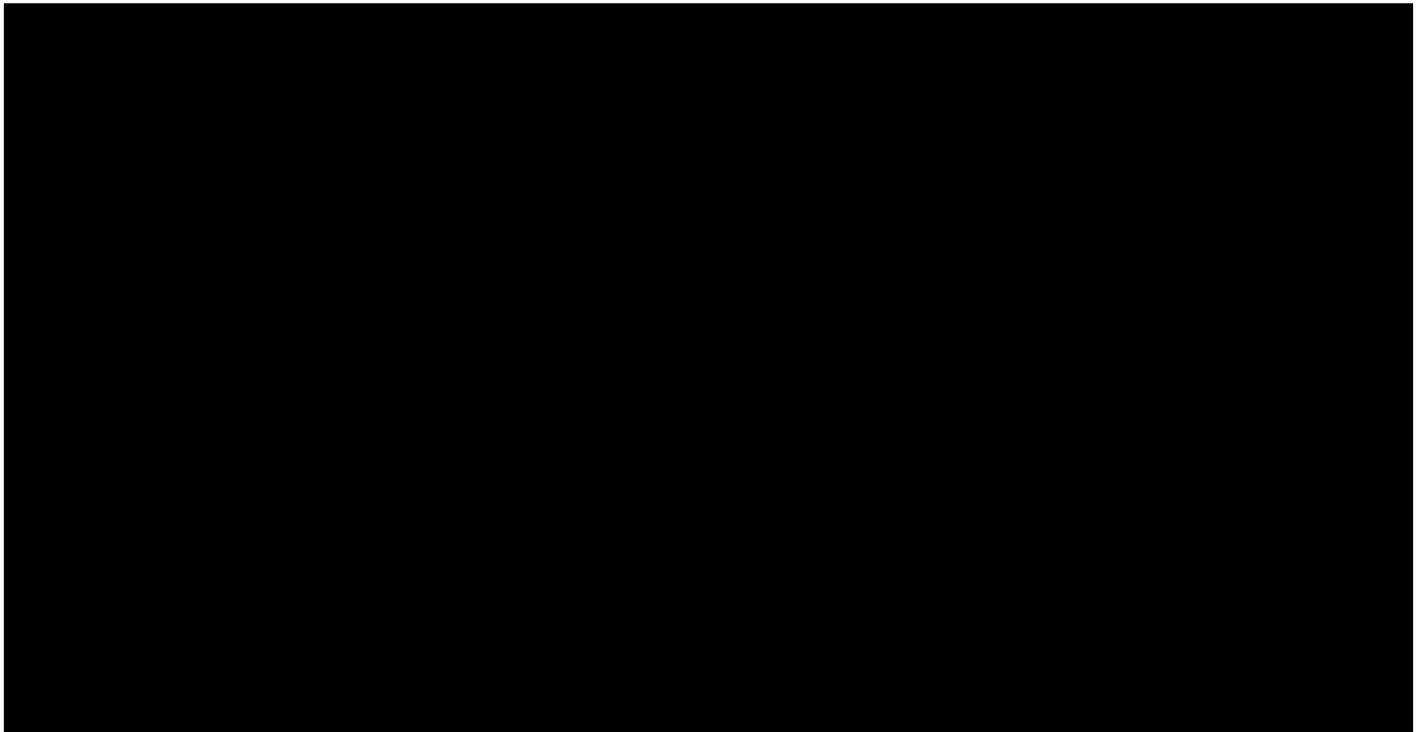
MICHAEL L. KELEHER (retired 2012)
CHARLES A. PHARRIS (retired 2014)
PHIL KREHBIEL (retired 2015)

W.A. KELEHER (1886-1972)
A.H. McLEOD (1902-1976)
JOHN B. TITTMANN (1907-1996)
RUSSELL MOORE (1931-2003)
MARGARET E. DAVIDSON (1950-2001)

Dean Alfred Mathewson, Chairman
Judicial Nominating Commission
University of New Mexico School of Law
MSC 11 6070
1 University of New Mexico
Albuquerque, NM 87131-001


Re: Judicial Application of Kerry C. Kiernan, Court of Appeals

Dear Dean Mathewson,



Dean Alfred Mathewson, Chairman
August 8, 2017
Page 2

Very truly yours,

By: 
Thomas C. Bird

TCB:kas
4827-7981-3948

4853-1936-9036, v. 1

RODEY, DICKASON, SLOAN, AKIN & ROBB, P. A.
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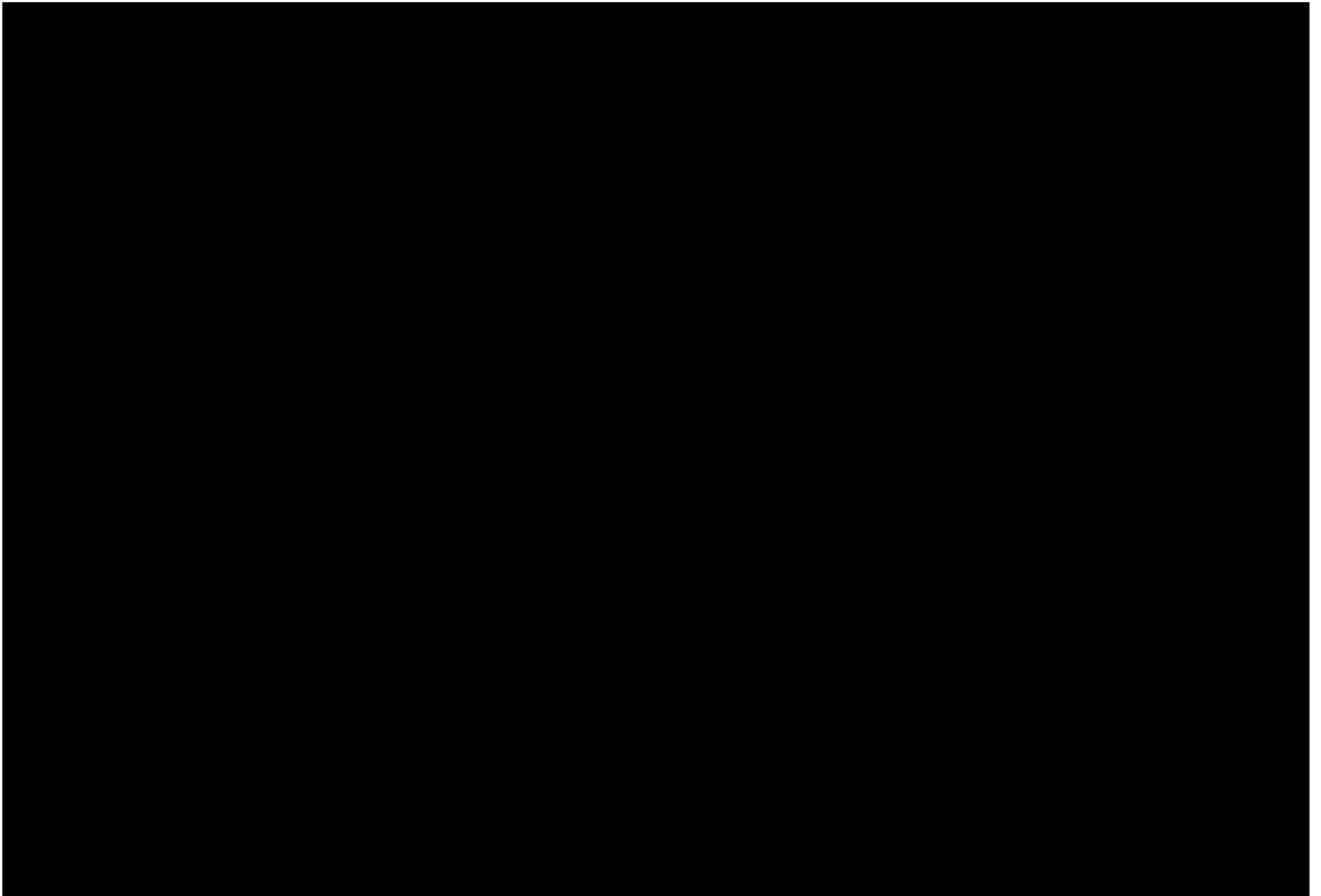
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November 28, 2016

Chair, Judicial Selection Commission
UNM School of Law
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1 University of New Mexico
Albuquerque, NM 87131-0001

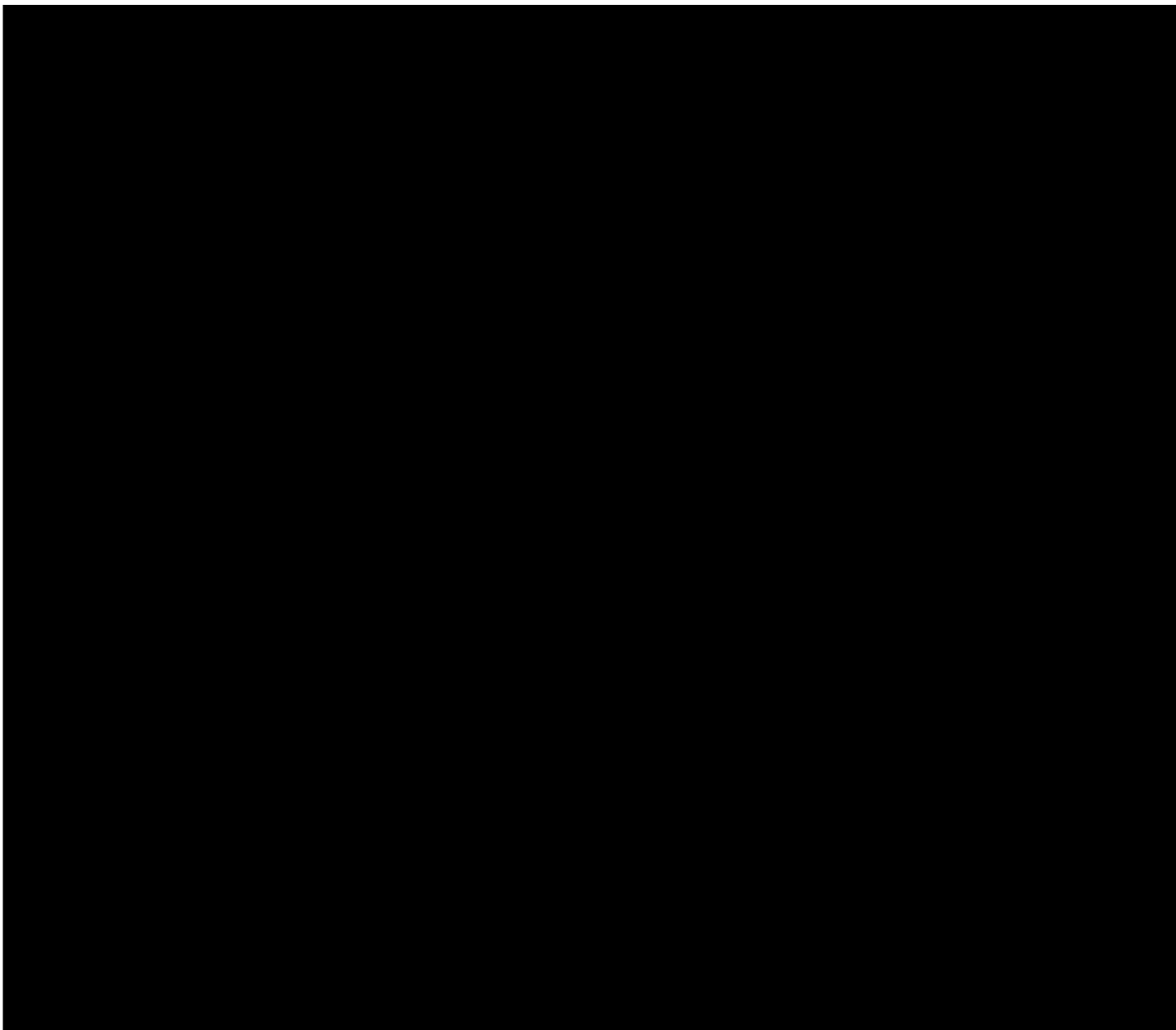
Re: Nomination of Kerry Kiernan to Fill Court of Appeals Vacancy Created by Retirement of
Judge James J. Wechsler

Dear Members of the Judicial Selection Commission:



November 28, 2016

Page 2



Yours truly,

A handwritten signature in black ink, appearing to read "Edward Ricco".

Edward Ricco

ER:wpc

BARDACKE

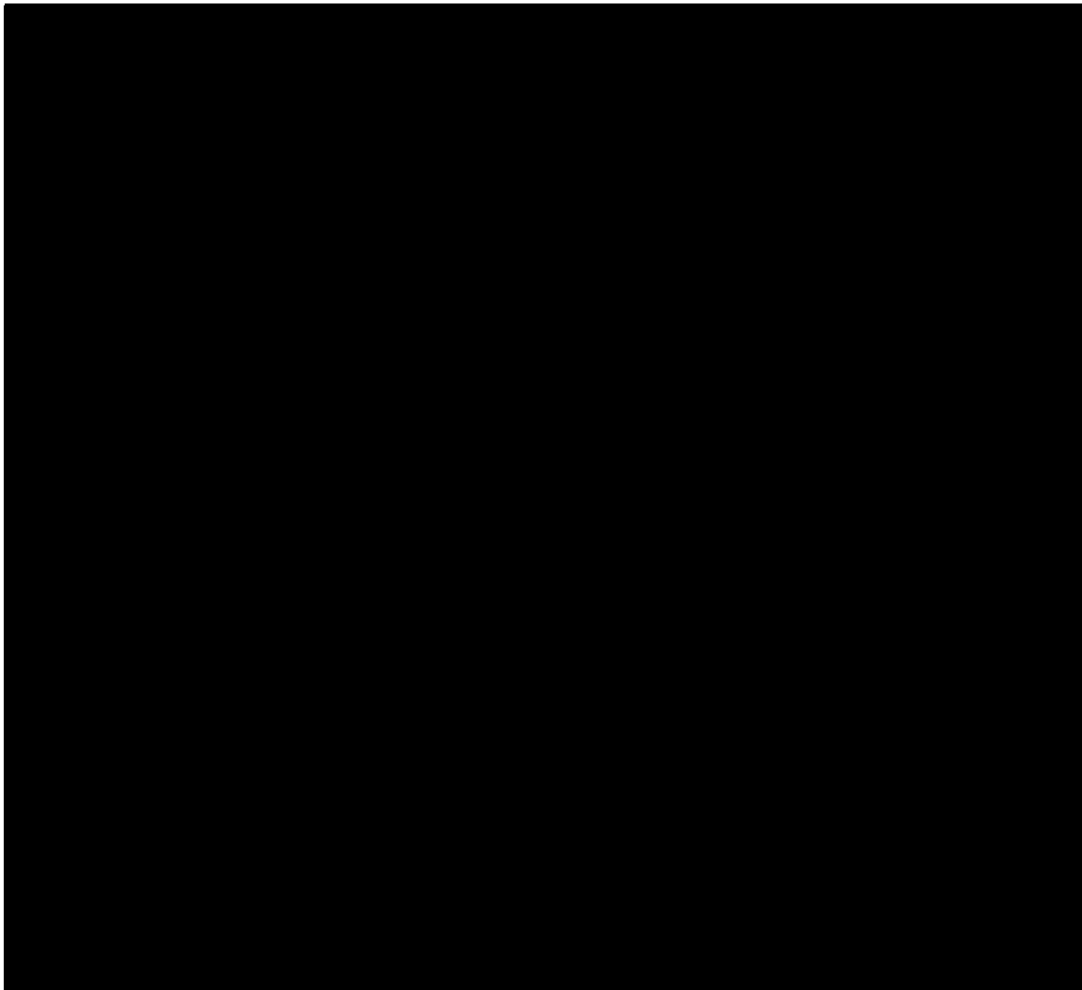
July 31, 2017

REC'D AUG 04 REC'D

Attention: Dean Alfred Mathewson, Chair
Judicial Nominating Commission
UNM School of Law
MSC11 6070
1 University of New Mexico
Albuquerque, NM 87131-0001

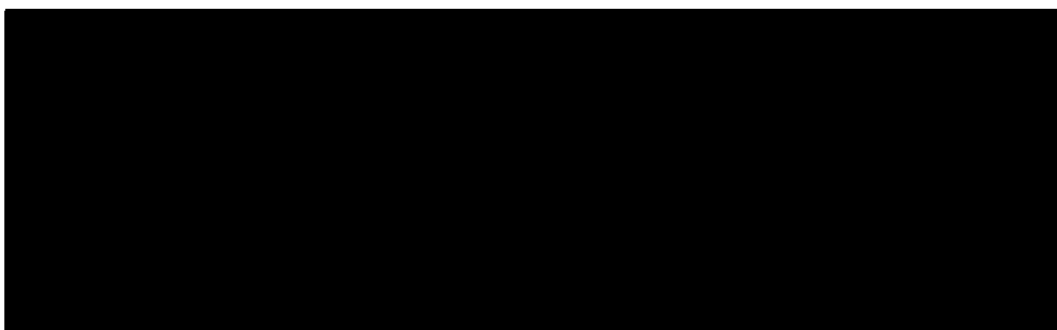
Re: Recommendation for Kerry Kiernan for Court of Appeals
vacancy created by Retirement of Judge James J. Wechsler

Dear Dean Mathewson:



BARDACKE ALLISON LLP PO BOX 1808 SANTA FE NM 87504
141 E PALACE AVENUE SANTA FE NM 87501 BARDACKEALLISON.COM 505 995 8000

NOSITTV



Sincerely,

A handwritten signature in black ink, which appears to read "Paul Bardacke", is written above the printed name.

Paul Bardacke

B

A